Office - Supreme Court, U. S.
FILED
MAR 5 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, JOHN J. GALLAGHER, HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, Petitioners,

v.

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and BROTHERHOOD OF RAILROAD TRAINMEN.

UNITED RAILROAD OPERATING CRAFTS, ROBERT M. HARKINSON and ARTHUR T. BESWICK, Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION

SHAD POLIER
MILLARD L. MIDONICK
Counsel for Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen

CLIFFORD D. O'BRIEN
RUTH WEYAND
Of Counsel for Brotherhood of Locomotive Engineers

HAROLD C. HEISS
RUSSELL B. DAY
Of Counsel for Brotherhood of Locomotive Firemen and Enginemen

307 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-3482-3.

IN THE

Supreme Court of the United States

October Term, 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, JOHN J. GALLAGHER, HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, Petitioners,

v.

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and BROTHERHOOD OF RAILROAD TRAINMEN.

UNITED RAILROAD OPERATING CRAFTS, ROBERT M. HARKINSON and ARTHUR T. BESWICK, Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION

Subsequent to the filing herein of our brief in opposition on December 30, 1953, the three-judge court convened in *Johns* v. *Baltimore and Ohio Railroad Company,* No. 53 C 1927, N. D. Ill. E. D. (referred to in that brief on p. 9), to consider a claim of a member of UROC that the whole Union Shop Amendment to the Railway Labor Act is un-

constitutional, held, in an opinion handed down on January 20, 1954 (reported 33 LRRM 2413), that no substantial constitutional question was presented and, accordingly, entered an order dissolving itself as improvidently constituted. A direct appeal to this Court therefrom has been noticed in the district court.

Also subsequently, petitions for writs of certiorari have been filed in three of the other cases cited in our brief in opposition (pp. 16-17) as involving members of UROC who have been discharged or threatened with discharge pursuant to a union shop contract. *UROC* v. *Northern Pacific R. R. Co.*, 208 F. 2d 135 (C. A. 9), petition for a writ of certiorari pending, No. 513, this Term; *UROC* v. *Pennsylvania Railroad Co.*, petition for writ of certiorari to the Court of Appeals for the Seventh Circuit pending before decision there, No. 548, this Term; *Pigott* v. *Detroit, Toledo & Ironton Railroad Co.*, 116 F. Supp. 949 (E. D. Mich.), petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit pending before decision there, No. 607, this Term. The petitions in these cases have stated that the issues therein presented are substantially the same as those presented in the instant case, and at least two of the petitions have urged this Court to grant certiorari in the instant case as well as in each of the other cases (Pet. No. 513, p. 9; Pet., No. 548, pp. 3, 4, 9-12; Pet., No. 607, pp. 2, 6, 15-19).

For these reasons we believe that this Court will find it useful to have before it an analysis of the relationship of the aforementioned cases to the instant case in its consideration of the petition here. We are, therefore, filing this brief to summarize the developments which have taken

place since the filing of our brief in opposition herein, and to point out that they do not provide any support for the grant of certiorari.

1. No constitutional question ripe for decision here is presented in any of these cases.[1]

In none of these cases was any constitutional question passed upon by a court of appeals. Only two of these cases have been before Courts of Appeals, the instant case (No. 472), and the *Northern Pacific* Case (No. 513).

While the petition in the instant case seeks to present four constitutional questions (Nos. 7-10, inclusive, Pet. pp. 4-5), these were neither presented to the district court nor to the court of appeals.[2] The petition in the *Northern*

---

1. In the *Pennsylvania* case (No. 548) the petition does not seek to raise any constitutional issue.

2. At page 8 of their brief in opposition in the instant case, the Engineers and the Firemen urged that, under the doctrine of *Duignan* v. *United States*, 274 U. S. 195, 200, petitioners were precluded from urging before this Court the unconstitutionality of the Railway Labor Act because petitioners had failed to raise any such issue in the courts below. Petitioners seek, at pages 3 to 4 of their reply brief, to avoid the rule of the *Duignan* case on the ground that the alleged constitutional questions (Nos. 7-10, Pet., pp. 4-5) were "engendered" in the instant case by the ruling by the district court that Congress had vested in administrative agencies exclusive jurisdiction over the subject matter of the action. The suggested distinction of the *Duignan* case, is, however, without merit. Assuming *arguendo*, that the constitutional questions were "engendered" by Judge Conger's ruling, the fact remains that petitioners had full opportunity to raise those very issues in the court of appeals. *Cf. Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673. Petitioners, therefore, stand upon no better footing than the appellant in *Duignan* v. *United States*, *supra*, where this Court declined to consider appellant's challenge to the constitutionality of forfeiture provisions of the National Prohibition Act because he had failed to present that contention to the Court of Appeals although he had made it in the District Court.

Pacific case does, in the last question urged (No. 6, Pet. p. 7), vaguely state a constitutional question respecting delegation to the National Railroad Adjustment Board of "legislative or judicial power". However, neither the petition nor supporting brief in that case makes any further mention of any constitutional issue. Moreover, as in the instant case, no issue of constitutionality had been presented in either the district court or the court of appeals.

Indeed, only in the *Johns* case was a constitutional issue tendered in a district court, and as stated above, the three-judge court held that no substantial constitutional question was presented. In neither of the other cases which UROC or its members seek to bring here before decision by the court of appeals (Nos. 548 and 607) was any of the constitutional questions here urged before, or passed upon by, the district court.

Thus, in this group of cases, UROC and its members are urging this Court to consider constitutional issues which have nowhere below been elucidated by argument, and moreover, to bring the questions here in two instances without even giving the courts of appeal an opportunity to pass upon them. Consideration below might prove that the constitutional issues are not present; that, if present, they are insubstantial; or that all the courts agree on their resolution. The procedure invoked here, absent any conflict in the decisions and any element of overweening immediate public interest, would be contrary to the principles by which this Court has limited its review of constitutional questions to those cases in which the resolution of the question was timely and unavoidable. *Alma Motor Co.*

v. *Timken C.*, 329 U. S. 129, 142. Those principles are especially applicable here since the constitutional questions urged by UROC in these cases are various and different.

In the *Johns* case the constitutionality of the whole Union Shop Amendment to the Railway Labor Act is attacked because of the alleged vague and indefinite standard provided by the phrase "national in scope." On the other hand, in three of the cases (Nos. 472, 548 and 607) the validity of the Union Shop Amendment is assumed, but by questions presented in the petitions for certiorari, various administrative procedures, which the courts have held should be utilized in its administration, have been attacked as unconstitutional.

In the *Northern Pacific* case (No. 548), the only constitutional question urged in the petition is whether the National Railroad Adjustment Board is not essentially a private body or agency and as such constitutionally incapable of making a statutory construction of the phrase "national in scope" (Pet. No. 548, p. 7, Question No. 7).

In the instant case (No. 472), not only is the foregoing constitutional question urged (Pet., No. 472, pp. 4-5, Questions Nos. 7 and 10) but also two other questions are presented attacking the validity of the procedures specified in Section 3, First (f) of the Railway Labor Act, whereby any labor organization seeking to establish its status as national in scope applies to the Secretary of Labor and a special three-man board convened by the National Mediation Board (Pet. No. 472, pp. 4-5, Questions Nos. 8 and 9).

In the *Pigott* case (No. 607) the petition urges the same question as to constitutional validity of the procedures

provided by Section 3, First (f) of the Railway Labor Act (Pet. No. 607, pp. 3-4, Question No. 4) as are urged in the instant case, and, in addition, three different questions: one relating to the constitutional validity of a holding that employees are prejudiced by the failure of the organization to which they belong, to resort to the procedures provided in Section 3, First (f) (Pet. No. 607, pp. 4-5, Question No. 7); another relating to the constitutional validity of making decisions of a special board of adjustment non-reviewable (Pet. 607, p. 4, Question No. 5); and a third relating to the validity of requiring employees to resort to a special board of adjustment for a determination as to their alleged non-compliance with a union shop agreement (Pet. No. 607, p. 4, Question No. 6).

Quite apart from the foregoing considerations, this Court, for another reason would not, in any of these cases pass upon the constitutionality of the administrative remedies provided in Section 3 of the Railway Labor Act. For in none of these cases have UROC and its members availed themselves of all the administrative procedures established by Congress.

In the instant case (No. 472), the *Northern Pacific* case (No. 513), and the *Johns* case, no resort has been had to the appropriate adjustment board. Moreover, in the instant case (No. 472), two of the individual petitioners assert objections to the validity of their discharge, which are not dependent upon either the interpretation or validity of the Union Shop Amendment and which, if established before the Adjustment Board, would obviate, as to those

members, any of the issues urged in this Court.[3] In *Pigott* (No. 607), while adjustment board procedures had been exhausted, the district court pointed out that resort to the Secretary of Labor and the three-man board provided by Section 3, First (f) had not been resorted to. In the *Johns* case the three-judge district court held no constitutional question was presented primarily because *Johns* had asserted various non-constitutional objections which were for consideration by the Adjustment Board and which might dispose of the case without need to reach any constitutional issue.

Not having availed themselves of the administrative procedures provided by the Railway Labor Act, UROC or its members are in no position to be heard to assert that those procedures are unconstitutional. *Aircraft Diesel Corp.* v. *Hirsch,* 331 U. S. 754. Certainly the *Hirsch* doctrine is *a fortiori* applicable in these cases. For the very right sought to be enforced by UROC and its members is entirely statutory in character. That right (*i.e.,* for railway employees to be free from having to maintain membership in the contracting union) is entirely founded in Paragraphs Fourth and Fifth of Section 2 of the Railway Labor Act. And Congress, which created that right, has, by Paragraph Eleventh of Section 2, qualified it by permitting carriers to require that employees maintain membership either in the contracting union or else in a "railway labor organization national in scope." See *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 315; *Otten* v.

3. If petitioners Carlson and Owens are correct in their allegations that they were denied the hearing by the Appellee carrier which was required by the applicable union shop contract (No. 472, R. 25-26; see p. 4 of our brief in opposition), the National Railroad Adjustment Board would order them reinstated irrespective of the status of UROC.

Baltimore & O. R. Co., 205 F. 2d 58 (C. A. 2). *Cf. International Brotherhood* v. *NLRB*, 341 U. S. 694, 705.

2. Only two cases even present a non-constitutional question which has been passed upon by the court of appeals, *i.e.*, the instant case (No. 472) and the *Northern Pacific* case (No. 513). In those cases the Courts of Appeals for the Second and Ninth Circuits respectively, have construed the Railway Labor Act as conferring on the National Railroad Adjustment Board, to the exclusion of the courts, jurisdiction to determine whether an employer may be required to retain in his employment or to reinstate an employee whom the employer has determined is not in compliance with a union shop contract. Thus, as to this question of statutory construction, there is unanimity, not conflict among the circuits.

Even in the district courts there is unanimity except for the one district judge in the *Pennsylvania* case (No. 548). Moreover, in that case a system board of adjustment rather than the national board would have heard the case,[4] and, in any event, the case was dismissed on the merits. And, subsequent to the *Pennsylvania* case, two other district judges of the same court and one of the judges of the court of appeals for that circuit, sitting as a three-judge court in the *Johns* case, approved the statutory construction adopted by the Courts of Appeal for the Second and Ninth Circuits.

---

4. Such special boards of adjustment are authorized by Section 3, Second of the Railway Labor Act (45 U. S. C. 153, Second) and have a jurisdictional scope limited to the same class of disputes as the National Railroad Adjustment Board. See *Primakow* v. *Ry. Express Agency*, 56 F. Supp. 413, 415 (E. D. Wis.); *Atlantic Coast Line R. Co.* v. *Pope*, 119 F. 2d 39, 43 (C. A. 4).

In the *Pigott* case (No. 607), the employees had already been to that special board and the jurisdictional issue before the district court was thus posed in the terms of the reviewability of decisions of special boards of adjustment. Consistently with the decisions in the instant case and the *Northern Pacific* case, the district court held that it was without jurisdiction because of the necessity to exhaust the procedures of Section 3, First (f) of the Railway Labor Act.

We believe that the reasons for denying the writ in the instant case set forth in our brief in opposition (pp. 8-18) are still fully applicable to the instant case, and are also applicable to all the other cases now pending here on petition by UROC or its members.

WHEREFORE, we urge that this Court do not grant certiorari in the instant case or Nos. 513, 548 or 607.

March 4, 1954.

Respectfully submitted,

SHAD POLIER
MILLARD L. MIDONICK
Counsel for Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen

CLIFFORD D. O'BRIEN
RUTH WEYAND
Of Counsel for Brotherhood of Locomotive Engineers

HAROLD C. HEISS
RUSSELL B. DAY
Of Counsel for Brotherhood of Locomotive Firemen and Enginemen